Supreme Court, U. S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1425

WILDERNESS PUBLIC RIGHTS FUND,
a nonprofit California corporation,
Petitioner,

vs.

THOMAS F. KLEPPE, Secretary of Interior, Department of the Interior, GARY EVERHARDT, Director of the National Park Service, HOWARD H. CHAPMAN, Regional Director of the Western Region of the National Park Service, and MERLE STITT, Superintendent of Grand Canyon National Park,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Wilderness Public Rights Fund, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on November 1, 1979.

OPINIONS BELOW

The November 1, 1979 Opinion of the Court of Appeals, whose Judgment is herein sought to be reviewed, is reported at 608 F. 2d 1250 and is reprinted as Appendix D to this Petition. The prior Opinion of the United States District Court for the Northern District of California, which was not reported, is also reprinted in the Appendix C.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered November 1, 1979. On December 17, 1979, the Court of Appeals made its Order Denying Petitioner's Petition for Hearing En Banc. A copy of said Denial is reprinted as Appendix A to this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Interior is in violation of 16 United States Code, Section 3 by his granting of permits for commercial uses in national parks to an extent it interferes with "free access" by the public.

2. Whether the Secretary of Interior is in violation of 16 United States Code, Section 20 by his granting of permits for commercial uses in national parks without limiting the concessions to those which are "necessary and appropriate" to the public use and enjoyment of the Parks.

3. Whether the Secretary of Interior is in violation of 16 United States Code, Sections 3 and 20 by his allocations of use permits in the Grand Canyon National Park which discriminate in favor of commercial concessions and those

persons who desire to use the national parks with the aid of a concessioner at the expense of those who prefer to use national parks without concessioners.

4. Whether 16 United States Code, Sections 3 and 20 prohibit the Secretary of Interior from granting commercial concessions and allocating use of public lands where to do so will require members of the public to pay a fee to a commercial concessioner for use of public lands where such members of the public have no need for the concessioners services.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretations and applications of 16 United States Code, Sections 3 and 20 which respectively provide, in part (full text is set forth in Appendix pages E-1 to E-3) as follows:

> "The Secretary . . . may grant privileges, leases and permits for the use of the land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this Title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public". 16 U.S.C., Section 3.
>
> ". . . It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas." 16 U.S.C., Section 20.

STATEMENT OF THE CASE

Petitioner is a California nonprofit corporation whose membership is made up of individuals who engage in, or desire to engage in, recreational activities on public lands, including rafting and boating the Colorado River in Grand Canyon National Park. Members of petitioner who are qualified* for rafting and boating applied in 1975 for permits to make noncommercial trips down the Colorado River, hereinafter referred to as "the River" in Grand Canyon National Park, hereinafter referred to as "the Park".[1] In 1975, as in all the years from 1973 through 1979, respondent Park Service had allocated only 8% of the available "user days"[2] to noncommercial permittees, the remaining 92% being given to commercial concessioners.[3] Since there were many more applications than noncommercial permits available, respondent National Park Service, refused to grant permits to a large number of the noncommercial applicants,[4] including petitioner's members, leaving petitioner's members with no access to the River unless they paid a fee to a concessioner whose services they did not require.

On or about January 13, 1975, a member of plaintiff served upon the Secretary of Interior a petition requesting a change in the allocation system for the issuance of permits on the River in the Park.[5] On or about May 22, 1975, this petition was denied. The present action was commenced on January 27, 1976, in the United States District Court for the Northern District of California against the Secretary of Interior and officials of the National Park Service who had responsibility for the maintenance and supervision of the Park for:

1. Judicial review of the Secretary's allocation of permits between commercial and noncommercial users;

2. Interpretation of Sections 3 and 20, Title 16, of the United States Code;

3. Judicial determination as to the extent of the authority of the Secretary of Interior to allocate natural resources contained in National Parks between free usage and commercial usage; and

4. Extraordinary relief against offices and employees of the United States or an agency thereof, to perform a duty owed to plaintiff and its members.[6]

Petitioner contended that in making the subject allocations between commercial and noncommercial uses respondents acted arbitrarily, capriciously and in abuse of their discretion and exceeded their statutory jurisdictional authority granted under Title 16, United States Code, Sections 1-20, 221 and 222.

1. Factual Background

The use of the River for floating down in rafts, dories, boats, and kayaks has developed to be a much coveted experience for Americans. Use of the River has grown from

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[1] 608 F. 2d 1250, 1252 (1979); Appendix D.

[2] A "user day" is the equivalent of one person on the River for one day, e.g. five user days could be five people on the River for one day or one person on the River for five days.

[3] 608 F. 2d 1250, 1252 (1979); Appendix D; Clerk's Transcript, page 61.

[4] Clerk's Transcript, pages 372, 380.

* A qualified applicant is one who has the experience and equipment, and otherwise meets the Park Service standards to float the River.

[5] 608 F. 2d 1250, 1252 (1979); Appendix D.

[6] Clerk's Transcript, page 1.

205 per year as recently as 1960 to over 14,000 in 1978.[7] Long before the development of the commercial outfitter industry, individuals made trips down the River, although their numbers were few as compared with the number of persons who make this trip today. In the late 1950s, enterprising individuals saw the commercial possibilities of providing trips down the River for a fee and thus the outfitter industry was born. In the last two decades the providing of River trips for a fee has become a $5 Million a year gross business.[8] There are at the present time approximately twenty commercial River running concession permits outstanding.[9]

In the last decade river rafting has become a very popular sport, not only on the Colorado River, but on many rivers all over the country. The necessary equipment is now widely available and the number of persons possessing the necessary skill and equipment to "run" rivers has increased dramatically.[10] Due to this advancement in the availability of equipment and skill, river use by noncommercial boaters generally presents no additional hazards over that of commercial users.[11]

Generally, the cost of a commercial trip down the Colorado River is significantly more than that of a non-

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[7]Final Environmental Statement, Proposed Colorado River Management Plan, page II-39 lodged with Ninth Circuit Court of Appeals as Exhibit D to appellant Wilderness Public Rights Fund Supplemental Brief.

[8]Clerk's Transcript, pages 374, 386.

[9]Clerk's Transcript, pages 373, 382-383.

[10]Clerk's Transcript, pages 259, 260.

[11]Respondents have conceded that they have no evidence that noncommercial use of the River is any less safe than that of commercial use, that it is any less sanitary, or that it is any more harmful to the environment than commercial use. Clerk's Transcript, pages 400, 401.

commercial trip. The cost of a trip with a concessioner will vary with the outfitter, the duration of the trip and the length of the trip. In 1975, the prices ranged from $27.70 to $78.00 a day, with a mean average of $46.00 per day. The average cost per person of a noncommercial trip was approximately $10.00 per day.[12]

To protect participants and the environment, the Secretary has set forth in the Code of Federal Regulations, Title 36, Section 7.4(h) the rules and regulations which govern trips down the River.[13] Pursuant to the Regulations, the Park Service reserves the right to limit the absolute number of permits which will be issued or granted for purposes of public safety or protection of ecological environmental values of the area. Under Section 7.4(h)(i), the Superintendent of the Park is directed to issue permits *to any person leading, guiding, or conducting a river trip who possesses adequate experience,* and it is further directed that no person shall make the trip without such a permit, Subdivision (ii). In Subdivision (iii), it is provided that an operation shall be defined as being commercial if a fee, charge, or other compensation is collected for conducting, leading, guiding, or outfitting a river trip, and that a river trip is not commercial if there is a bona fide sharing of actual expenses. The Secretary does reserve the right to pass upon the qualifications of any person seeking a permit to outfit, lead, or guide a trip down the River. The Secretary does not however, under the rules, attempt to assert any authority to make allocations between the individuals who are otherwise qualified.

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[12]Clerk's Transcript, pages 374, 375, 386, 456.

[13]Appendix pages E-3 to E-5.

Prior to 1972, no limitations on the number of users existed. In December of 1972, however, because of the huge increase in demand and in order to protect this limited resource, respondents imposed an overall limit on the number of user days which would be available for either commercial or noncommercial uses.[14] At the same time, respondents made an allocation of the user days available between the commercial and noncommercial users based upon the actual use of the River in 1972, prior to the fixing of the ceiling. Under the allocation system established by respondents, 92% of the user days went to commercial users and the remaining 8% went to noncommercial users.[15] Respondents continue to use the same allocation system at this time.[16]

In recent years, the number of noncommercial permit applications to run the River has increased in geometric proportions. In 1972 only 44 permits representing 7,611 "user days" were applied for; all were granted.[17] In 1979 there were 441 applications, representing 86,346 user days

[14]608 F. 2d 1250, 1251 (1979).

[15]608 F. 2d 1251 (1979).

[16]608 F. 2d 1252 (1979);

Under the Colorado River Management Plan, promulgated by respondents in 1979, respondents indicated that they would increase noncommercial usage to 30% of the total. However, this allocation has been made without any findings and without following the Congressional mandates of 16 United States Code, Sections 3 and 20. Therefore, for the purposes of this action, the allocation system is the same even though the figures have been changed. Further, the increase in noncommercial use is being accomplished by making available more permits to noncommercial users during the less desirable times of the year.

[17]Clerk's Transcript, pages 372, 380.

applied for. However, only 47 permits representing 7,600 user days were granted to the noncommercial sector.[18]

Because of the small percentage of user days made available to the general public for noncommercial uses, respondents have rejected an ever increasing number of qualified applications each year. In 1973, this number was 25; in 1974 it was 43; in 1975 it was 131; and in 1979 it was 394, representing approximately 78,000 user days.[19] These figures do not include those applications which were refused for lack of qualifications or duplication of entries. Each one of these rejected applications represents on the average 11 people,[20] and therefore, free access to the River was denied to over 4,400 people in the year 1979 alone. Some of these individuals who have been denied permits are members of petitioner.[21]

While many noncommercial applicants have waited years to be granted a permit, commercial passengers generally have been able to secure passage on the River whenever they have wanted to. The commercial sector did not use all of its allocation in any year except 1978.[22] In 1976,

[18]Final Environmental Statement, Proposed Colorado River Management Plan, page II-43 lodged with Ninth Circuit Court of Appeals as Exhibit D to appellant Wilderness Public Rights Fund Supplemental Brief.

[19]id.

[20]Final Environmental Statement, Proposed Colorado River Management Plan, page II-44 lodged with Ninth Circuit Court of Appeals as Exhibit D to appellant Wilderness Public Rights Fund Supplemental Brief.

[21]Clerk's Transcript, pages 256, 257.

[22]Final Environmental Statement, Proposed Colorado River Management Plan, page II-44 lodged with Ninth Circuit Court of Appeals as Exhibit D to appellant Wilderness Public Rights Fund Supplemental Brief.

for example, user days allocated to concessioners went unused while 81,448 user days were denied to noncommercial applicants.[23] Many times noncommercial applicants had no choice but to take a trip with a concessioner.

Public concern has grown over respondents' policies of granting lion's share of all available user days to the commercial sector at the expense of those who neither desire, require, and sometimes cannot afford the services of a professional guide to float the River. This concern is evidenced by this lawsuit, debates which have taken place in Congress, correspondence to respondents relative to the Colorado River Management Plan and in correspondence which has taken place between the Legislative Branch and the Executive Branch of the Government.[24]

In December of 1979, respondents promulgated the Colorado River Management Plan. Under the Plan, respondents have departed from the allocation based on the 1972 level of 92% user days for commercial operators and 8% user days for noncommercial river runners. Under the new Plan, 70% of the user days will be allocated for commercial trips and 30% for noncommercial trips.[25] However, in neither the Environmental Impact Statement nor any of the other documents relating to the Colorado River Management Plan did respondents make any findings or base this new allocation upon the mandates of 16 United States Code, Sections 3 and 20.

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[23]id.

[24]Clerk's Transcript, page 237; 111 Congressional Record 23641 (1965).

[25]608 F. 2d 1250, 1254 (1979); Appendix D.

2. The Rulings Below

This action was commenced on January 27, 1976 in the United States District Court for the Northern District of California. The jurisdiction of the District Court was invoked under 28 United States Code, Sections 1331 and 1361 and 5 United States Code, Sections 701-706.[26] On or about December 16, 1976, the United States District Court for the Northern District of California granted respondents' Motion for Summary Judgment.[27]

On November 1, 1979, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's granting of respondents' Motion for Summary Judgment, holding that the Secretary's allocation was within his discretionary powers and that the new allocation pursuant to the Colorado River Management Plan mooted petitioner's challenge.[28] Petitioner's request for rehearing en banc was denied December 17, 1979 by the Ninth Circuit.[29]

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because:

1. This case presents to the Court for the first time certain key questions in regard to the use of public lands.

2. A judicial interpretation of the "free access" clause of 16 United States Code, Section 3 and the "necessary and appropriate" clause of 16 United States Code, Section 20 is necessary for the proper administration of the National Parks.

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[26]Clerk's Transcript, page 1.

[27]Clerk's Transcript, page 312.

[28]608 F. 2d 1250 (1979); Appendix D.

[29]id.

3. The interpretation of 16 United States Code, Sections 3 and 20 affects not only the allocation of natural resources in National Parks, but the allocation of the uses of all public lands.

1. This Jase Presents to the Court for the First Time Certain Key Questions in Regard to the Use of Public Lands

As set forth in the Questions Presented, this controversy presents to this Court important issues relative to the power of the Secretary of Interior to allocate use of the National Parks between the commercial and noncommercial sectors. Basically, the Court must decide the extent to which the "free access" clause of 16 U.S.C., Section 3 and the "necessary and appropriate" clause of 16 U.S.C., Section 20 limits the Secretary's power to make such allocations.

The issues involved in this action have not been decided by this Court previously and will have a profound effect upon the public use of the National Parks as well as other public lands. "The importance of the decision to the utilization of the public lands" is an important factor in the Supreme Court's decision to grant certiorari in a case involving statutory construction or application, *United States v. Coleman,* 390 U.S. 599, 601 (1968). Similarly, this Court should grant certiorari and review the important issues here.

Up until recent years the demand for use of natural resources in national parks did not have to be rationed. The population of the United States and the number of foreign tourists visiting here had not made such a demand on the use of these resources so as to require any form

of rationing or limitation of use. At the present time we are faced with such a demand for utilization of these resources that to fail to draw some limitations would be to permit the resource to become exhausted and destroyed. It was for this reason that the Secretary of Interior in 1972 made the decision to limit the number of persons and number of trips that may be made down the Colorado River in Grand Canyon National Park.[30] No one can question that the Secretary has the authority to do this nor would any reasonable man question that it was in the best interest of all that such a limitation be made.

However, inherent in drawing any limitation at all is a second question and that question was who was to be granted the use of the resources and who was to be denied that use. This presents a different question and one which is far more difficult to answer.

In the instant case, there are two classes of permits which are granted for rafting, boating, etc., on the Colorado River in Grand Canyon National Park. The first class of permits are those granted to the commercial sector: To concessioners who provide professional guided tours for their passengers down the River for profit. The second class of permits are those granted to noncommercial parties who also take passengers with them but charge no fee for their services; expenses are shared by all participants including the permittee, thereby reducing the cost of the trip.

The Secretary of Interior made a decision to allocate 92% of the permits to commercial concessioners and the

[30] 608 F. 2d 1250, 1251 (1979); Appendix D.

remaining 8% to noncommercial permittees. The Secretary has continued this allocation ratio from 1972 through the present. The Secretary's allocation is not based on any findings or consideration of whether the allocations interfere with the "free access" of the public to the national park or whether the allocation to the commercial concessioners is "necessary and appropriate".

Although respondents have promulgated a new Colorado River Management Plan in December 1979 which promises to allocate 30% of the River use to the noncommercial sector, this new Plan is also not based on any findings or considerations whatsoever relative to the "free access" by the public or the necessity and appropriateness of the commercial permits. For this reason the new Colorado River Management Plan does not render moot any of the issues in this case.

Although the Courts have previously been called upon to define the Secretary's powers in regard to whether or not the Secretary had the authority to make regulations or allocations between individual commercial concessioners, *Udall v. Washington, Virginia and Maryland Coach Company* (D.C. Cir. 1968), 398 F. 2d 765, cert. den. 393 U.S. 1017, 21 L.Ed.2d 561 (1969); the *United States v. Greyline Water Tours of Charleston* (4th Cir. 1962) 311 F. 2d 779; *U.S. v. Carter* (D. Ariz. 1972) 339 F. Supp. 1934; *Western River Expeditions, Inc. v. Morton* (D. Utah, June 4, 1973) Civ. No. C-125-b, the Court has never been called upon to decide how much discretion the Secretary of Interior has to decide how much of a natural resource on public lands may be utilized for commercial purposes and how much

will be made available free to the public and to what extent this discretion is limited by the statutory provisions of 16 U.S.C., Sections 3 and 20.

In a letter to Representative William S. Moorehead, Chairman, Subcommittee on Conservation, Energy and Natural Resources, the Honorable Nathaniel Reed, former Assistant Secretary of Interior, made the following comment in regard to the case presently before the Court:

> "As you may know, this basic issue is now in litigation. At this point we have no indication as to how the court will address the question or what the outcome may be. It (Wilderness Public Rights Fund v. Kleppe, et al.) will be a landmark case in deciding a fundamental argument about the use of public resources."[31]

2. Certiorari Should Be Granted to Clarify Judicial Interpretation of 16 United States Code, Sections 3 and 20

In this case, the Court must interpret for the first time, two statutory provisions which are of profound importance to the management of our national parks: The "free access" clause of 16 U.S.C., Section 3, and the "necessary and appropriate" clause of 16 U.S.C., Section 20.

The national parks' system was created under Title 16 of the United States Code. 16 U.S.C., Section 3 is concerned with the duties and powers of the Secretary of Interior and provides in part:

> "He (Secretary of Interior) may also grant privileges, leases, and permits for the use of land for the accom-

[31]Clerk's Transcript, page 237.

modation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this Title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to *interfere with the free access to them by the public. . . .*". (Emphasis added).

It has been petitioner's position that the Secretary is governed by Section 3 and that he does not have the discretion to interfere with the "free access" of any person in regard to their use of the National Parks where there is no basis for such denial. Petitioner contends that the Secretary's allocation system has the effect of forcing members of the public to retain professional guides (commercial concessioners) for a fee where they are not desired and not required for either safety or ecological reasons; this unwarranted interference with free access by the public violates the clear mandate of 16 U.S.C., Section 3. Further, by granting concessions and commercial passengers a much greater access to the use of the Colorado River the Secretary was interfering with the noncommercial sectors' right to free access.

In their decision upholding the District Court's granting of Summary Judgment, the Court of Appeals sanctioned the Secretary's allocation system based on the Secretary's general discretionary powers to manage the national parks. The Court of Appeals did not address itself to the limits which the "free and access" clause places on the Secretary's powers or attempt to give it any meaningful interpretation. The Congressional mandate in Section 3 is strong and it

is the duty of this Court to apply its limitations to the Secretary of Interior.

16 U.S.C., Section 20 also provides important limitations on the Secretary's power to to manage the National Parks. Section 20 authorized the Secretary of Interior to provide public accommodations, facilities, and services in the National Parks, but contains the following limitation: "It is the policy of the Congress that such development shall be limited to *those that are necessary and appropriate for public use and enjoyment of the national park area* in which they are located and that are consistent to the highest practicable degree for the preservation and conservation of the areas". (Emphasis added). The key words in this clause are "necessary and appropriate".

It was the petitioner's position in the Court below that "necessary and appropriate" limited the Secretary's discretion to the extent that he could grant only those commercial concessions that are necessary and appropriate for the public use and enjoyment of the national parks. The Secretary's allocation system, by granting concessioners and commercial passengers much greater ease of access to the use of the Colorado River in effect forces many members of the public who prefer to use the River without a concessioner to use a concessioner's services that are neither desired nor needed.

The decision of the Court of Appeals leaves the "necessary and appropriate" clause without significance or meaning. This Court should interpret the "necessary and appropriate" clause and effectually circumscribe the Secretary's power pursuant to its dictates.

3. Certiorari Should Be Granted in This Case Because the Effect of the Decision Here Will Not Be Limited to the Colorado River in Grand Canyon National Park But Will Effect the Allocation Between Commercial and Noncommercial Uses on All Public Lands

The "free access" and the "necessary and appropriate" clauses of 16 U.S.C., Sections 3 and 20 provide limitations for the granting of commercial concessions in the national park. There are similar provisions in the statutes and regulations which govern public lands other than the national parks and the agencies which manage them.[32]

Since allocation between commercial and noncommercial uses is becoming common on all public lands the decision in this case will provide precedent by analogy and will

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[32]16 U.S.C., Section 497 which applies to the Secretary of Agriculture and the Forest Service has provisions similar to both the "free access" and the "necessary and appropriate" clauses. Section 497 authorizes the use of land within national forests "for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities *necessary or desirable* for recreation, public convenience, or safety". (Emphasis added). Section 497 also provides "the authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests".

16 U.S.C., Section 1133(d)(6) which is part of the statutory authority for managing "wilderness" areas provides:

> "Commercial services may be performed within the wilderness areas designated by this chapter to the extent *necessary* for activities which are proper for realizing the recreational or other wilderness purposes of the area". (Emphasis added).

The regulations for managing the national wildlife refuges provides in Title 50 of the Code of Federal Regulations Section 25.61:

> "Public use facilities may be operated by concessioners or cooperators under appropriate contract or legal agreement on national wildlife refuges where there is a demonstrated *justified need for services or facilities. . . .*". (Emphasis supplied).

The list of statutory authorities is not intended to be exhaustive.

greatly influence the managing agencies in their allocation of use. Since this decision has such a far reaching impact, it is critical it be reviewed by this Court.

SUMMATION

This case deals with the question of the power of the Secretary of Interior to allocate uses of National Park land between commercial and noncommercial users. The decision here will not be limited to the allocation of rafting permits in Grand Canyon National Park but will affect the entire question of how much priority, if any, the commercial sector should have over numbers of the general public in all of those situations where some limitations must be set on the use of the nature resource.

The Court of Appeals below was content to leave this question entirely in the discretion of the Secretary of Interior. Petitioner submits that the Secretary's discretion is not without limitation in that he must be governed by the statutes which created the national park system and 16 U.S.C., Sections 3 and 20 in particular. It is the petitioner's position that the Secretary of Interior may grant only those concessions which are necessary and appropriate and never to an extent that they would interfere with members of the public having free access to the natural wonders and curiosities in the National Parks. In affirming the Summary Judgment granted in the U.S. District Court, the Court of Appeals has rejected this contention and in effect ruled that the authority of the Secretary of Interior is without any limitations whatsoever.

Whether there are any limitations upon the Secretary of Interior and what those limitations are by judicial inter-

pretation of statute is a question which should be decided by this Court, since such a decision will be pertinent not only to the National Park involved here but to all public lands.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

DONALD NEMIR
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Attorneys for Petitioner

Appendices

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

Wilderness Public Rights Fund, etc., Plaintiff-Appellant, vs. Thomas F. Kleppe, et al., Defendants-Appellees.	No. 77-1606
Frederick B. Eiseman, Jr., et al., Plaintiffs-Appellants, vs. Thomas F. Kleppe, et al, Defendants-Appellees.	No. 77-3693

[Filed Dec. 17, 1979]

ORDER

Before: MERRILL, ANDERSON and SKOPIL,
Circuit Judges

The panel as constituted in the above cases has voted to deny the petition for rehearing in each of the above-entitled appeals.

On the suggestion for rehearing en banc filed by Wilderness Public Rights Fund, Judges Anderson and Skopil voted to deny the petition and Judge Merrill recommended against an en banc hearing.

The panel also decided to amend the opinion in the respect specified below.

The full court has been advised of the suggestion for an en banc hearing filed by Wilderness Public Rights Fund, and of the amendment to the opinion proposed by the panel, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing in each appeal is denied. The suggestion for a rehearing en banc filed by Wilderness Public Rights Fund is rejected. The opinion heretofore filed herein is amended, page 547 of the slip printing, line 3, by adding "necessary and" after the word "are."

Appendix B

United States District Court for the
Northern District of California

Wilderness Public Rights Fund, a non-profit California corporation, Plaintiff, vs. Thomas F. Kleppe, Secretary of Interior, Department of the Interior, et al., Defendants.	Civil No. C-76-0187 CFP

[Filed Dec. 22, 1976]

JUDGMENT

Pursuant to the Memorandum and Order of this Court, filed December 16, 1976,

IT IS HEREBY ORDERED AND ADJUDGED that judgment for defendants, THOMAS F. KLEPPE, GARY EVERHARDT, HOWARD H. CHAPMAN, and MERLE STITT, be entered against plaintiff, WILDERNESS PUBLIC RIGHTS FUND, and that said defendants recover their costs of suit from plaintiff.

Dated: December 22, 1976.

/s/ CECIL F. POOLE
Judge, United States District Court, Northern District of California

Appendix C

United States District Court
Northern District of California

Wilderness Public Rights Fund, a non-profit California corporation, Plaintiff, vs. Thomas F. Kleppe, Secretary of the Interior, Department of the Interior, Gary Everhardt, Director of the National Park Service, Howard W. Chapman, Regional Director of the Western Region of the National Park Service, and Merle Stitt, Superintendent of Grand Canyon National Park, Defendants.	No. C-76-187-CFP

[Filed Dec. 16, 1976]

MEMORANDUM AND ORDER

Presently before the Court are plaintiff's motion for a preliminary injunction and defendants' motion to dismiss or, in the alternative, for summary judgment. For the following reasons, the Court concludes that plaintiff has not met the requirements for issuance of a preliminary injunction and that, although subject matter jurisdiction exists, summary judgment for the defendants is appropriate.

Plaintiff, a non-profit corporation composed of individuals who engage in recreational activities on public lands, filed a complaint for injunctive and declaratory

relief based on 28 U.S.C. §§ 1331 and 1361 and 5 U.S.C. §§ 701-706. Plaintiff notes that on December 6, 1972 the Department of the Interior, through the National Park Service, set a limit upon rafting and boating recreational use of the Colorado River in Grand Canyon National Park, for environmental reasons. At the same time the National Park Service allocated use pursuant to a formula based on actual use in 1972. Available commercial rafting and boating use was set at 89,000 user/days* and noncommercial (i.e., non-profit, expense-sharing) rafting and boating use was set at 7,600 user/days—a ratio of ninety-two percent commercial use to eight percent noncommercial use.

Plaintiff claims that in 1975 the demand for permits by qualified noncommercial users had risen to approximately eight times the demand in 1972 and that defendants' failure to change the ratio by increasing the noncommercial allocation and decreasing the commercial allocation constitutes a denial to its members of a free access to the Colorado River. Accordingly, plaintiff prays for an order: (1) preventing defendants from issuing or extending any permits, licenses, concessions or franchises for river rafting and boating in Grand Canyon National Park to commercial permittees and concessioners until it can be determined to what extent commercial services are necessary and appropriate; (2) declaring that qualified members of the public who make timely application to the National Park Service for noncommercial permits are entitled to priority over commercial permittees and concessioners; (3) directing defendants to make a comprehensive revision

*The term "user/days" means the number of days or portions thereof spent by each visitor on the river. For example, one visitor spending five days on the river amounts to five user/days.

of regulations governing the allocation of permitted use, providing for maximum utilization, within regulatory ceilings, by qualified noncommercial users and allocating only the resulting reduced permitted use to commercial permittees and concessioners.

Defendants have responded with a motion to dismiss or for summary judgment, discussed *infra*. Essentially they claim that the 1972 limitation on user/days was part of an interim river management plan which is to remain in effect until adequate information about the river and its environs can be gathered in connection with preparation of the final river management plan. The current level and allocation of permitted use will continue only until the river research programs are completed and the final plan is adopted.

Motion For Preliminary Injunction

The commercial permittees and concessioners are presently operating under five-year permits which will expire on December 31, 1976. Defendants intend to renew the permits for a period of three years, commencing January 1, 1977 and ending December 31, 1979. Although plaintiff is not attempting to prevent renewal, it seeks to enjoin defendants from renewing the permits for more than a one-year period. Defendants respond that the permits can be terminated or renewed at any time, thereby obviating the necessity for such a preliminary injunction. After reading the briefs and hearing argument on this point the Court permitted the parties to submit supplemental briefs following review of the proposed three-year extension agreements.

The Court notes that the agreements though nominally for three years clearly state that the permits thereunder are subject to cancellation, termination and revocation at an earlier date; that the Park Service Director reserves the right to regulate, limit, apportion, condition and adjust the concessioners' use; and that the Director bears no legal liability to the concessioners should such action become necessary. Furthermore, in the event of termination for the convenience of the Park Service, the agreements give the Director the discretion to decide whether and to what extent the concessioners should be compensated. Defendants say they have deliberately injected such flexibility in the agreements because the results of the comprehensive river study may well require a change in the allocation and level of commercial permits.

Therefore, even applying the liberal criteria of a threat of serious harm to plaintiff coupled with a fair chance of success on the merits, announced in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.,* 526 F.2d 86 (9th Cir. 1975), plaintiff's application for a preliminary injunction must be denied.

Motion To Dismiss

Defendants moved to dismiss for lack of subject matter jurisdiction on the grounds that none of the statutes sued under provides a waiver of sovereign immunity or an independent basis of jurisdiction. On November 1, 1976, however, defendants withdrew the defense of sovereign immunity.

The courts are divided as to whether the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.,* confers jurisdiction or merely addresses the scope of review once jurisdiction is established. See, for example, *CCO-Western Region v. Fellows,* 359 F.Supp. 644, 646-47 (N.D. Cal. 1972) and the cases cited therein. Assuming *arguendo* that neither the Administrative Procedures Act nor the mandamus statute, 28 U.S.C. § 1361, confers jurisdiction, plaintiff also alleges a denial of equal protection. Defendants have not challenged federal question jurisdiction, and the Court finds that such jurisdiction exists.

Motion For Summary Judgment

The standard for review on defendants' motion for summary judgment is whether the Secretary acted within his authority, and whether his action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971).

The pertinent statutory and regulatory scheme clearly authorizes the Secretary's use of concessioners to facilitate environmentally sound public use of the national parks. Indeed, the fundamental purpose of the National Park Service, according to 16 U.S.C. § 1, is to conserve park resources, providing for the enjoyment of parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Section Three authorizes rules and regulations to that end, including the grant of privileges, leases and permits for the use of land for the accommodation of visitors. It further provides, as

plaintiff points out, that "[N]o natural curiosities, wonders or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public."

Furthermore, in 16 U.S.C. § 20 "Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services . . . should be provided only under carefully controlled safeguards against unregulated and indiscriminate use. . . ." Section 20(a) authorizes the Secretary to take action to encourage and enable private persons and corporations, or concessioners, to provide and operate facilities and services which he deems desirable for the accommodation of visitors.

Finally, the regulations governing Colorado River whitewater trips provide that the National Park Service reserves the right to limit the number of permits issued when, in its opinion, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area. See 36 C.F.R. § 7.4(h)(3) (1975). Accordingly even plaintiff concedes that defendants were authorized to impose the 1972 freeze on total user/days.

Turning to the question of whether the Secretary abused his discretion in failing to make periodic adjustments in the allocation formula, the Court first notes that allocation of use may properly be based upon historical use. See *Udall v. Washington, Virginia & Maryland Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1017 (1968). Defendants' stated purpose for the freeze was to maintain the status quo while allowing time to obtain sound

data on which to base river use capacity. At present, insufficient information exists as to whether one type of use is more harmful than another type or what the accurate measure of the demand for commercial trips is. Since the final river report, which will be subject to public review and debate, may call for a significant change in policy necessitating the filing of an environmental impact report, defendants do not want to alter the allocation at this stage.

Defendants also challenge plaintiff's contention that its members' "free access" to the river is being restricted, noting that the expense involved in outfitting a river trip may approach or even exceed the concessioner's fee. While plaintiff's members are qualified to guide river trips, have access to the necessary equipment, and live in the region of the Colorado River, the Secretary must attempt to meet the needs of the general public.

In an action by commercial permittees challenging a reduction in allotment of commercial use, *Western River Expeditions, Inc. v. Morton,* Civil No. C-125-73 (D.Utah, June 4, 1973), the Court upheld the Secretary's action upon a showing that defendants acted within their statutory authority and upon a rational basis in connection with the supervision of river running activities. The Court also finds that the Secretary has made the requisite showing for summary judgment.

Accordingly, IT IS ORDERED that plaintiff's motion for a preliminary injunction be, and the same is, hereby denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction be, and the same is, hereby denied.

IT IS FURTHER ORDERED that summary judgment in favor of defendants be, and the same is, hereby granted.

Dated: December 16, 1976

/s/ CECIL F. POOLE
United States District Judge

Appendix D

United States Court of Appeals,
Ninth Circuit

Wilderness Public Rights Fund, a non-profit California Corporation, Plaintiff-Appellant, vs. Thomas F. Kleppe, Secretary of Interior, Department of the Interior, Gary Everhardt, Director of the National Park Service, Howard H. Chapman, Regional Director of the Western Region of the National Park Service, and Merle Stitt, Superintendent of Grand Canyon National Park, Defendants-Appellees	Nos. 77-1606,
Frederick B. Eiseman, Jr., and Margaret H. Eiseman, husband and wife, J. R. Hertzler, Michael St. Clair, Plaintiffs-Appellants, vs. Thomas F. Kleppe, in his capacity as Secretary of the U. S. Department of Interior, Gary Everhardt, in his capacity as Director of the National Park Service, and Merle Stitt, in his capacity as Superintendent of Grand Canyon National Park, Defendants-Appellees.	77-3693

Nov. 1, 1979
As Amended on
Denial of Rehearing and Rehearing
En Banc Dec. 17, 1979.

Before MERRILL and ANDERSON, Circuit Judges,
and SKOPIL, District Judge.

MERRILL, Circuit Judge:

These cases involve the manner in which use of the Colorado River for rafting and boating is apportioned between concessioners approved by the National Park Service and noncommercial users. Permits from the National Park Service are required for river use and the dispute here concerns the apportionment made in granting permits.

In December, 1972, the Secretary of the Interior found that the boating and rafting use of the Colorado River in the Grand Canyon National Park had experienced such an increase that it posed a threat to the ecology of the river. A study was initiated for the purpose of ascertaining river capacity and it was decided that until completion of the study use of the river should be frozen at the 1972 level. Accordingly, river use was limited to 96,600 user days per year (a user day being one day spent on the river by one person). This total use was apportioned between two user groups in the ratio of actual 1972 use by each group: 89,000 user days or 92 percent of the total use was allotted to commercial concessioners of the Park Service who, for a fee, make guided trips through the canyon; 7,600 user days or 8 percent of the total was allotted to noncommercial users who apply for permits as private groups. Noncommercial users for the most part are experienced in river running and furnish their own equipment and supplies. Expenses are shared, as is the performance of the necessary duties involved. Permits for river use and the apportionment thereof have remained frozen at the 1972 level.

Appellants are, or represent, noncommercial river runners who, on various grounds, challenge the apportionment between commercial and noncommercial users. They assert that they, or those they represent, have applied for permits from the Park Service which were denied, the Service instead having granted permits to persons who used them for commercial purposes. In January 1975, a member of Wilderness Public Rights Fund petitioned the Secretary for a change in the allocation system for the issuance of permits. The request was denied.

Both actions before us assert jurisdiction under the judicial review portions of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The Wilderness Public Rights Fund action was brought in the Northern District of California in June, 1976. As relief it sought an injunction staying the issuance of permits for river use to commercial permittees and concessioners "until such time as it can be determined to what extent commercial services are necessary and appropriate." It sought a declaration that noncommercial users are entitled to priority over commercial users.

The Eiseman action was brought in the District of Arizona in March, 1977. It was more modest in its claims and in the relief sought. It did not seek priority for the noncommercial users over the commercial users. It sought equal access to the river and an order directing the Secretary and the Service to implement a plan providing equal access.

In both cases summary judgment in favor of appellees was granted and these appeals followed.

A number of statutes and regulations bear on the issues of these actions. 16 U.S.C. § 1 creates the National Park Service (hereinafter NPS) in the Department of the Interior and directs it to "promote and regulate the use of the Federal areas known as national parks, monuments and reservations * * * by such means and measures as conform to the fundamental purpose of said parks, monuments and reservations * * * ." That purpose is stated to be "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

16 U.S.C. § 3 provides in part:

> "The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *. He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments or other reservations [herein provided for] but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public * * *."

Pursuant to this authority the Secretary has promulgated 36 C.F.R. § 7.4(h)(3) as follows:

> "(3) No person shall conduct, lead, or guide a river trip unless such person possesses a permit issued by the Superintendent, Grand Canyon National Park. The

> National Park Service reserves the right to limit the number of such permits issued, or the number of persons travelling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area."

The Concessions Policy Act, 16 U.S.C. § 20 provides in part:

> "It is the policy of the Congress that such development [concessions] shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located * * *."

Appellants first attack the failure of the NPS to follow the dictates of the Administrative Procedure Act. They contend that the allocation of user days between commercial and noncommercial users amounted to rule making and that no hearings were held where the noncommercial users could present their views, contrary to the requirements of the Administrative Procedure Act.

That Act, 5 U.S.C. § 553(a)(2), excepts from the rule-making procedures "a matter relating * * * to public property, loans, grants, benefits or contracts." The government contends that this exempts the action of the Secretary in freezing the 1972 river use and apportioning that use between the commercial and noncommercial users. We agree. *Cf. Duke City Lumber Co. v. Butz,* 382 F.Supp. 362, 378 (D.D.C. 1974), *aff'd in part,* 176 U.S.App.D.C. 218, 539 F.2d 220 (D.C.Cir. 1976), *cert. denied,* 429 U.S. 1039, 97 S.Ct. 737, 50 L.Ed.2d 751 (1977).

Appellants contend that allocation between commercial and noncommercial use of the river is not an acceptable method of accomplishing a limitation of river use. They propose that anyone wishing to run the river should apply for a permit, leaving to him, if his application be granted, the choice between joining a guided party or a noncommercial party; that permits then be granted by lottery or on a first-come-first-served basis. They assert that the record establishes that such a method is feasible. They contend that there is no justification for allocating between commercial and noncommercial use, and that to do so amounts to arbitrary action; that it denies them "free access" to the river contrary to 16 U.S.C. § 3 and permits development by concession to a degree in excess of that allowed by the Concessions Policy Act. We disagree.

The Secretary of the Interior, acting through the NPS, has the wide ranging responsibility of managing the national parks. 16 U.S.C. § 3. *Universal Interpretive Shuttle Corp. v. WMATC,* 393 U.S. 186, 187, 89 S.Ct. 354, 21 L.Ed. 2d 334 (1968); *Udall v. Washington, Virginia & Maryland Coach Co.,* 130 U.S.App.D.C. 171, 398 F.2d 765 (D.C.Cir. 1968), *cert. denied,* 393 U.S. 1017, 89 S.Ct. 620, 622, 21 L.Ed.2d 561 (1969). Pursuant to this authority, the NPS regulates use of the Colorado River through the permit requirement described in 36 C.F.R. § 7.4(h)(3), *supra.* In issuing permits, the Service has recognized that those who make recreational use of the river fall into two classes: those who have the skills and equipment to run the river without professional guidance and those who do not. The Service recognizes its obligation to protect the interests of both classes of users. It can hardly be faulted for doing

so. If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others. We must confine our review of the permit system to the question whether the NPS has acted within its authority and whether the action taken is arbitrary. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Allocation of the limited use between the two groups is one method of assuring that the rights of each are recognized and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary. It is well within the area of administrative discretion granted to the NPS.

Throughout these proceedings Wildnerness Public Rights Fund has persisted in viewing the dispute as one between the recreational users of the river and the commercial operators, whose use is for profit. It asserts that by giving a firm allocation to the commercial operators to the disadvantage of those who wish to run the river on their own the Service is commercializing the park. The Fund ignores the fact that the commercial operators, as concessioners of the Service, undertake a public function to provide services that the NPS deems desirable for those visiting the area. 16 U.S.C. § 20a. *See, Universal Interpretive Shuttle Corp. v. WMATC, supra.* The basic face-off is not between the commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.

While the Concessions Policy Act, 16 U.S.C. § 20, *supra,* expresses the congressional intent that the granting of con-

cessions shall be limited to "those that are necessary and appropriate for public use and enjoyment" of the park involved, the authority for the granting of concessions is given to the Secretary by 16 U.S.C. § 3, and there is no showing here of arbitrary action or abuse of that authority.

Appellants also complain that noncommercial applicants receive unfair and unequal treatment at the hands of the Service. They must apply to the Service for permits and thus must plan their trips well in advance. Deadlines must be met. The names of all in the proposed party (with signatures) must be set forth. Those who make the trip under guide may deal directly with the concessioners and make arrangements at the last minute. This comports with the NPS' right to regulate river trips in the interests of safety. 36 C.F.R. § 7.4(h)(3). We find nothing unreasonable in thus assuring, as matter of safety, that those who make the trip on their own without concessioners' supervision have undertaken the necessary preparation and possess the necessary skill to participate in the activities involved.

We conclude that allocation between the two classes of recreational users is not per se an arbitrary method of recognizing and accommodating the interests of the two classes. The question remaining is whether allocation has been fairly made pursuant to appropriate standards.

There is a judicial presumption favoring the validity of administrative action. *See Duesing v. Udall,* 121 U.S.App. D.C. 370, 350 F.2d 748 (D.C.Cir. 1965), *cert. denied,* 383 U.S. 912, 86 S.Ct. 888, 15 L.Ed.2d 667 (1966). Where several administrative solutions exist for a problem, courts will uphold any one with a rational basis, but the Secretary's balancing of competing uses must not be an arbitrary

one. *Udall v. Washington, Virginia and Maryland Coach Co. supra.*

Appellants challenge the method used by the Park Service in determining allocation between the classes of users for the reason that it is founded on 1972 data. It is asserted that since that year there has been a substantial increase in the demand for use by noncommercial users, and that to freeze allocation of use on the basis of seven-year-old data in the face of rapid change is arbitrary and unreasonable.

We are informed, however, that the study initiated by the National Park Service has now been completed and that the interim basis for allocation between the two classes of users—freezing at the 1972 level—is being abandoned. A proposed management plan for the river and a draft environmental impact statement have been completed and published. The allocation departs from the 1972 level of 92 percent user days for commercial operators and 8 percent user days for noncommercial river runners. Under the plan, 70 percent of the user days will be allocated for commercial trips and 30 percent for noncommercial trips. The period assigned for comment has expired and it is anticipated that a final plan will be forthcoming in a matter of weeks.

This renders moot challenges to the specifics of the interim management plan, now about to be superseded by a final plan. The basis for the claim of arbitrariness—that the freezing of use and allocation of use at the 1972 levels is, in 1979, unreasonable—falls from the case.

Judgment affirmed.

Appendix E

Title 16, United States Code § 3

§ 3. Same; rules and regulations; timber; leases

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2 and 4 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this title, but for periods not exceeding thirty

years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: *Provided, however,* That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation referred to in this section and sections 1, 2 and 4 of this title when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: *And provided further,* That the Secretary of the Interior may grant said privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: *And provided further,* That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing: *And provided further,* That the Secretary may, in his discretion, authorize such grantees, permittees, or licensees to execute mortgages and issue bonds, shares of stock, and other evidences of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging, or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments.

Title 16, United States Code § 20

§ 20. Congressional findings and statement of purpose

In furtherance of sections 1 and 2 to 4 of this title, as amended, which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

Pub.L. 89-249, § 1, Oct. 9, 1965, 79 Stat. 969.

Code of Federal Regulations

Title 36—Parks, Forests, and Memorials

Section 7.4

(h) *Colorado whitewater trips.* The following regulations shall apply to all persons and vessels using federally owned land administered by the National Park Service along the Colorado River in Grand Canyon National Park:

(1) No person shall operate a vessel engaging in predominantly upstream travel or having a total horsepower in excess of 55.

(2) U.S. Coast Guard approved life preservers must be worn by every person while on the river or while lining or portaging near rough water. One extra preserver must be carried for each ten (10) persons.

(3) No person shall conduct, lead, or guide a river trip unless such person possesses a permit issued by the Superintendent, Grand Canyon National Park. The National Park Service reserves the right to limit the number of such permits issued, or the number of persons traveling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area.

(i) The Superintendent shall issue a permit upon a determination that the person leading, guiding, or conducting a river trip is experienced in running rivers in white water navigation of similar difficulty, and possesses appropriate equipment, which is identified in the terms and conditions of the permit.

(ii) No person shall conduct, lead, guide, or outfit a commercial river trip without first securing the above permit and possessing an additional permit authorizing the conduct of a commercial or business activity in the park.

(iii) An operation is commercial if any fee, charge or other compensation is collected for conducting, leading,

guiding, or outfitting a river trip. A river trip is not commercial if there is a bona fide sharing of actual expenses.

(4) All human waste will be taken out of the Canyon and deposited in established receptacles, or will be disposed of by such means as is determined by the Superintendent.

(5) No person shall take a dog, cat, or other pet on a river trip.

(6) The kindling of a fire is permitted only on beaches. The fire must be completely extinguished only with water before abandoning the area.

Supreme Court, U.S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1425 and 79-1447

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILDERNESS PUBLIC RIGHTS FUND, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

FREDERICK B. EISEMAN, JR., ET AL., PETITIONERS

v.

CECIL D ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (79-1425 Pet. App. D; 79-1447 Pet. App. 20-29) is reported at 608 F. 2d 1250. The opinion of the district court in No. 79-1425 (Pet. App. C) is unreported. The opinion of the district court in No. 79-1447 is reported at 433 F. Supp. 1103.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1979. On December 17, 1979, a timely petition for rehearing was denied (79-1425 Pet. App. A; 79-1447 Pet. App. 30-31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under circumstances concededly requiring limitations on the use of the Colorado River for recreational boating within the Grand Canyon National Park, the National Park Service acted within its statutory authority in allocating use between those members of the general public with skills and equipment sufficient to undertake white-water boating on their own, and those who prefer the services of professional concessioners.

STATUTES INVOLVED

Section 3 of the National Park Service Act, ch. 408, 39 Stat. 535, 16 U.S.C. 3 provides in relevant part:

> The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * * . He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations * * *, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest

> shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public * * *.

Section 1 of the Concessions Policy Act, Pub. L. No. 89-249, 79 Stat. 969, 16 U.S.C. 20, provides in relevant part:

> [T]he Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as to have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

STATEMENT

This case involves two actions brought independently by the Wilderness Public Rights Fund ("Wilderness Fund") and Frederick B. Eiseman, Jr. *et al.* ("Eiseman") challenging the authority of the National Park Service[1] to

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[1]The Secretary of the Interior is responsible for maintaining our national parks and for providing facilities and services for their enjoyment by the public through concessioners or otherwise. 16 U.S.C. 1, 3, 20. This responsibility is carried out principally by the National Park Service as an agency of the Department of the Interior. See *Universal Interpretive Shuttle Corp.* v. *Washington Metro Area Transit Comm'n*, 393 U.S. 186, 187 n. 1 (1968).

allocate permits for recreational boating on the Colorado River within the Grand Canyon National Park between those members of the general public with skills and equipment sufficient to undertake white-water boating on their own ("noncommercial" river runners), and those who wish or require the services of professional concessioners ("commercial" users or passengers).[2] All such river use is subject to Park Service permit, and the dispute here relates only to the apportionment made between these two classes of use.

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[2]The terms "commercial" and "noncommercial" are defined by the Park Service as follows:

> *Commercial* Refers to boating companies who are concessioners operating under a permit from the National Park Service. These companies arrange river trips which provide a crew, equipment, and supplies to visitors for a fee. The crew operates the boats, prepares meals, sets up camp, and provides educational opportunities to learn about the area. "Commercial outfitter" is synonymous with "commercial river-running company."
>
> *Noncommercial* Refers to boaters who are skilled river runners organizing river trips with their own crew, equipment, and supplies. On these trips, the participants share the responsibilities and cost of operation of the boats along with meal preparation, and other camp duties. No fees are paid for guide services or are collected above the actual cost of the trip. Also termed "private."

Colorado River Management Plan, App. E at 1-2 (Dec. 20, 1979). Copies of the proposed plan, as well as the draft environmental statement were lodged with the court of appeals as Exhibit D to the Supplemental Brief of petitioner Wilderness Fund. For the convenience of this Court, we are lodging copies of the final plan and environmental statement with the Clerk.

1. Park Service regulation of Colorado River use is intended to protect the health and safety of river travellers as well as the natural environment. All river users must comply with provisions specifying suitable types of watercraft, emergency equipment and procedures, and measures for environmental protection (*e.g.*, fires and waste disposal). See 36 C.F.R. 7.4(h); Colorado River Management Plan, App. A-1 to A-6.

Commercial guides and trip leaders must meet more stringent standards of river running knowledge and experience than those required of noncommercial users. Management Plan App. A-4 to A-5. Noncommercial trip permits are issued only to those whose applications detail their ability to meet all equipment and experience requirements. Concessioners' operations are subject to on-river evaluations at least three times annually. *Id.* at 24.

2. In 1972 the Park Service found that increasing recreational use of the Colorado River threatened its natural environment (79-1425 Pet. App. D-2).[3] Studies were commenced to ascertain the river's carrying capacity and to formulate a comprehensive plan for its management and use. Pending completion of this effort, the Park Service placed an annual ceiling on the number of river user days,[4] and apportioned this allowable total use between commercial passengers and noncommercial river runners on the basis of actual usage by each group in 1972 (*ibid.*).

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[3]River use for 1972 alone exceeded that of the entire 100-year period from 1870 through 1969. Management Plan, at 2.

[4]One user day equals one passenger on the river for one day.

As a result, commercial users were allotted 89,000 user days and noncommercial users 7,600 user days, or 92% and 8%, respectively, of the annual limit of 96,600 user days (*ibid.*). From 1973 through 1979, this remained the formula under which the Park Service allocated river use permits. As a result of the recently adopted Colorado River Management Plan, permits will be issued for a greatly increased level of total usage with an apportionment of roughly 70% commercial, 30% noncommercial, beginning in 1980 (79-1425 Pet. App. D-9; Management Plan at 15-22).

3. In January 1976, petitioner Wilderness Fund, a non-profit corporation whose membership includes recreational boating enthusiasts brought suit alleging that members wishing to engage in noncommercial river running were being denied "free access" to the Colorado River by the Park Service's allocation formula at a time when demand for permits had risen substantially (R. 1, 3).[5] Wilderness Fund alleged that such permit allocation was beyond the Park Service's statutory authority and contrary to the "free access" and "necessary and appropriate" clauses of 16 U.S.C. 3 and 20, respectively (R. 4). Wilderness Fund sought an injunction and stay of the issuance of permits for commercial users and a declaration that noncommercial users were entitled to priority treatment (R. 5-6).

Following discovery (R. 369-475), the district court denied a preliminary injunction and granted summary judgment for respondents (79-1425 Pet. App. C-3 to C-7). Noting that Wilderness Fund had conceded the authority

[5]"R." refers to the record on appeal.

of the Park Service to impose its limit on total river usage (*id.* at C-6), the district court concluded that allocation of total use between commercial and noncommercial river trips was equally within the broad statutory authority conferred by 16 U.S.C. 1, 3, 20 and 20a (*id.* at C-5 to C-6). The court found further that basing permit allocation on actual 1972 use was reasonable, pending study and development of a final river management plan (79-1425 Pet. App. C-6 to C-7). As to plaintiff's call for "free access," the court said (*id.* at C-7):

> While plaintiff's members are qualified to guide river trips, have access to the necessary equipment, and live in the region of the Colorado River, the [Park Service] must attempt to meet the needs of the general public.

4. *Eiseman* petitioners, individuals who had been denied noncommercial river-running permits, brought a similar action in March 1977.[6] Again, petitioners did not "contest the power and authority of the Park Service to restrict the *Total use* of the River to historical use levels * * *" (433 F. Supp. at 1106) (emphasis in original). Here too, the district court granted summary judgment, concluding (433 F. Supp. at 1106):

> [T]he allocation of usage in the interim plan has a rational basis, is within the Secretary's discretion, and furthers the legitimate governmental objective of providing for the greatest possible public enjoyment of the river experience subject to ecological, environmental and public safety limitations.

[6]Eiseman's action raised procedural (5 U.S.C. 553 and Constitutional Fifth Amendment) issues as well. Neither the district court (433 F. Supp. at 1105, 1107) nor the court of appeals (79-1447 Pet. App. 24-25, 26-28) found merit in these contentions. Petitioners no longer urge them here (79-1447 Pet. 8 n.3).

5. The cases were consolidated for argument before the court of appeals, which affirmed both in a single opinion (79-1425 Pet. App. D). The court of appeals recognized the board management authority conferred by 16 U.S.C. 3 and that its "free access' clause necessarily must be applied to protect the access of the general public and not just a particular segment thereof (*id.* at D-6 to D-7):

> In issuing permits, the Service has recognized that those who make recreational use of the river fall into two classes: those who have the skills and equipment to run the river without professional guidance and those who do not. The Service recognizes its obligation to protect the interests of both classes of users. It can hardly be faulted for doing so. If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others.

Similarly, the court found (*id.* at D-8) no "arbitrary action or abuse" of the authority to grant concessions "necessary and appropriate for public use and enjoyment," 16 U.S.C. 20, in order to provide the general public with professional assistance in running the Colorado.

Having found that the Park Service possessed the necessary statutory authority, and that its allocation of river use between these two classes of users was "not per se an arbitrary method of recognizing and accommodating the[ir] interests" (79-1425 Pet. App. D-8), the court declined to rule on the particular allocation

formula challenged below (*id.* at D-9). The court concluded that petitioners' challenges to the "specifics" of the interim management plan were mooted by reason of the Colorado River Management Plan (*ibid.*).[7]

ARGUMENT

Petitioners contend that the Secretary lacks authority to allocate users-days between commercial and noncommercial users. However, the Courts below held that the Secretary clearly has such authority. No conflict among the circuits exists on this issue. Moreover, the particular allocation scheme challenged by petitioners has been superseded by one substantially more generous to petitioners. Review by this Court is not warranted.

1. Significantly, petitioners do not challenge either the authority or the need for the Park Service to limit the total annual recreational use of the Colorado River (see 79-1425 Pet. 13). Nor do they challenge here the Service's equipment, health and safety, or environmental regulations governing river trips, or the manner in which these regulations are implemented. They recognize (79-1425 Pet. 14) that the Secretary of the Interior, acting through the National Park Service, has wide-ranging statutory responsibility and authority for managing our

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[7]On December 20, 1979, the final management plan was approved by the Park Service. By lengthening the summer season and using limits on daily launches and trip size (rather than user days) as the key use factors, the present management plan has substantially increased both the allowable total river usage and the allocation to noncommercial users like petitioners. Under the new plan, noncommercial use is expected to increase more than 700% (as compared to 130% for commercial use) by 1982. Management Plan, at 22.

national parks and providing services for their public enjoyment through concessioners. *Universal Interpretive Shuttle Corp.* v. *Washington Metro Area Transit Comm'n*, *supra*, 393 U.S. at 187, 189. It is equally clear that the Secretary may regulate such concessioners and allocate service among them. *Udall* v. *Washington, Virginia & Maryland Coach Co.*, 398 F. 2d 765, 767, 769-770 (D.C. Cir. 1968), cert. denied, 393 U.S. 1017 (1969). See 16 U.S.C. 20-20g.

2. Contrary to petitioners' contentions, the allocation of permits on the basis of commercial and noncommercial status does not violate the "free access" clause of 16 U.S.C. 3. As the court of appeals found (79-1425 Pet. App. D-7):

> The basic face-off is not between commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.

Neither class of users can run the river without cost, whether for private equipment and supplies or fees to concessioners. But these are alternative prices for the means to raft the river, and neither constitutes a fee for simple access to it.[8] Allocation by the Park Service is not a denial of "free access" to either group, but a convenient

[8]The legislative history of 16 U.S.C. 3 offers no illumination of the meaning of its "free access" proviso. See *e.g.* H. R. Rep. No. 64-700, 64th Cong., 1st Sess. 3, 5 (1916). We agree that the natural thrust of its language is to prevent "commerical control of areas containing natural wonders," and fees to private parties for simple access to public property (see 79-1447 Pet. 10).

means of accommodating their divergent interests and abilities.[9]

3. Nor does the allocation violate 16 U.S.C. 20. Assuming that a rafting enterprise is "development" within the meaning of 16 U.S.C. 20, the venture is "necessary and appropriate" to enjoyment of the river, and commercial operators are "necessary and appropriate" to any enjoyment at all for those who are unequipped to run the river themselves.

4. The Park Service is bound to manage the national parks in a manner that takes into consideration the interests of the whole public and not just a segment thereof. The methods it has chosen here are consistent with that obligation, and within its statutory authority. The interim management plan, and its allocation of use, were, as both district courts found (79-1425 Pet. App. D-6 to D-7), rationally based on actual use in 1972. But the court of appeals, in our view, correctly found that further consideration of petitioners' complaint as to the specifics of the interim plan was mooted by adoption of the final

[9]Petitioners trivialize the river-running experience in comparing the allocation challenged here to a requirement that "70% of the tourists sightseeing on the [Washington D.C.] Mall" use a commercial guide (79-1447 Pet. 13-14). As the *Eiseman* district court found (433 F. Supp. at 1106):

> Running the River is not like standing on a viewpoint enjoying the Grand Canyon scene. It is clear that there is a far greater demand to ride the River with a concessionaire's professional pilot and guide than demand for noncommercial private trips. This is true historically and because of the obvious dangers involved in running a wild river and the limited number of people with the equipment, experience and qualification to "go it alone."

Colorado River Management P.an. with its substantially increased allocation of river use to noncommercial river runners (*supra*, pages 6, 9 note 7).

The current plan apparently does not satisfy petitioners. Indeed, it has recently been challenged by concessioners as well.[10] We submit, however, that the reasonable approach of the Park Service to the necessity of allocating river use for the benefit of the whole public, by successive approximations if necessary,[11] fully deserves the deference it received below. *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965).

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[10]The program to phase out use of motorized watercraft on the river over a five-year period (Colorado River Management Plan, at 15) is now in litigation. *Mountain States Legal Foundation, et al.* v. *Whalen, Director, National Park Service, et al.*, Civ. No. 80-0233 (D. Ariz., filed Mar. 28, 1980).

[11]The present allocation is not immutable, but subject to review and adjustment:

> The allocation ratio is, because of the above factors, a best estimate based on experience and interpretation of the available data. This ratio will be reviewed and adjusted as more reliable information becomes available.

Colorado River Management Plan, at 21.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980